

REMARKS

Claims 1, 4, and 7-9, as amended, and new claims 10-23, are pending for the Examiner's review and consideration. Claims 2-3 and 5-6 are cancelled herein without prejudice to Applicants' rights to file one or more continuing applications directed to this or other unclaimed subject matter. Claim 1 was amended to include the features recited in original claims 2 and 5-6. New claim 13 also includes the features of original claims 2 and 5. Claim 1, as well as new claim 13, further recite a cookie as obtained from a chilled or frozen state in a merchandiser with an interior space maintained at a controlled temperature of 95°F to 150°F with air circulation in said space to assist in warming and providing a moisture gradient over a period of up to 6 hours, wherein said baked cookie after said period of 6 hours has a dual texture (*See, e.g.*, Specification at page 11, lines 30-31; at page 15, lines 1-7; and at page 17, lines 27-28). Similarly, new claim 15 recites a baked cookie prepared by warming a previously chilled or frozen baked cookie in such a merchandiser. Claims 7-8 were amended to change their dependency from canceled claim 2 to pending claim 1. Claim 4 was amended to correct a typographical error and to depend from pending claim 1.

New claims 10 and 14-15 recite a cookie that has an average moisture level of about 6.5 to 10 weight percent water moisture after baking, which cookie maintains its dual texture and average moisture level for at least about 2 to 8 hours after baking (*See, e.g.*, original claim 1). New claims 11 and 13 recite that the outer portion of the cookie has a stress of at least 150 g/mm² and the central zone has a stress of less than 45 g/mm² after 6 hours of warming in the merchandiser (*See, e.g.*, Specification at page 16, lines 25-26). New claim 12 recites that the cookie has an organoleptically desirable dual texture that is detectably drier and crispier in the outer portion and moister and chewier in the central portion (*See, e.g.*, Specification at page 16, lines 1-2). New claims 16-23, which all ultimately depend from new independent claim 15, recite the same features found in original claims 2-9. No new matter has been introduced by any of the amendments or new claims herein, such that entry of the claims is warranted at this time.

Initially, Applicants note that references AO and AP on the Information Disclosure Statement submitted September 17, 2003 were not considered because copies of the references were not submitted. Applicants submit herewith copies of these two references, entitled "Wisco Industries, Brochure: Prepare Perfect Pizza & Snacks with Wisco Oven & Warmers" and "Heated Merchandisers," Henny Penny Corporation (April 1999). Applicants respectfully request that these references be made part of the record by the Examiner's completion of the copy of the Form PTO-1449 which notes these two references, submitted herewith.

The abstract of the disclosure was objected to on page 2 of the Office Action because it allegedly did not describe the claimed invention sufficiently to assist readers in deciding to consult the full patent text or not. The abstract has been amended accordingly.

Claims 1-9 were rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement. The Office Action on page 2 maintains that there is no teaching as to how the claimed baked cookie with a dual texture is obtained. Applicants respectfully traverse.

Initially, with all due respect, the Examiner has the initial burden to establish a reasonable basis to question the enablement provided for the claimed invention. MPEP § 2164.04. A specification disclosure which contains a teaching of the manner and process of making and using an invention in terms which correspond in scope to those used in describing and defining the subject matter sought to be patented must be taken as being in compliance with the enablement requirement, unless there is a reason to doubt the objective truth of the statements enabling support. *Id.* In spite of the failure of the Office Action to establish this initial burden of lack of enablement of the claimed baked cookie with dual texture, Applicants set forth just a few of the many details disclosed in the present application that enable others to make and/or use the claimed invention.

As explained in significant detail throughout the specification (*See, e.g.,* Specification at page 11, line 11 to page 12, line 13), the dual texture of the claimed cookie is mainly achieved by following the processing conditions that include preparing a suitably moist conventional cookie (*See, e.g.,* Specification at page 12, lines 11-13) by baking to achieve a dual texture of crispier outer portion and chewier central portion, then chilling or freezing the previously baked cookie in a manner sufficient to inhibit or prevent substantial modification of the moisture profile in the chilled or frozen baked cookies, followed by the controlled warming and drying of the cookies to obtain the desired moisture gradient while providing the organoleptically desired dual texture to the warmed, previously baked cookies. The controlled drying is achieved after creating a moisture gradient in the baked product to produce the dual texture (*See, e.g.,* Specification at page 9, lines 9-13). The merchandiser disclosed and described typically controls the warming and drying of the baked product so as to warm the previously baked cookies while retaining a sufficient moisture profile therein that is desirable to consumers (Specification at page 15, lines 17-18). The structure of the merchandiser is described in detail in the disclosure (Specification at page 13, lines 33). Examples 3 and 4 demonstrate that previously baked cookies warmed in the merchandiser achieve and maintain the desired dual texture, as evidenced by the moisture gradient.

Various additional details are disclosed that enable those of ordinary skill in the art to obtain in reproducible fashion the superior baked cookie of the present invention. One way the claimed baked cookies can be obtained is in the merchandiser described in the application that is claimed in the parent application, which merchandiser facilitates the claimed dual texture through the contact the support surface has with a portion of the base of the baked cookie. The support surface contacts at least a portion of each previously baked cookie to shield those portions from direct contact with heated air, which facilitates drying of the moisture in the baked products in a controlled manner (Specification at page 15, lines 1-5). Furthermore, the entire bottom of the baked product may be contacted by the support surface to minimize moisture migration (Specification at page 15, lines 11-16). Preferably, at least about 34% of the base of each product contacts the support member, and the enclosure is configured and arranged to reduce the loss of moisture to achieve the desired moisture gradient (Specification at page 5, lines 26-28).

Products in which the dual texture is desired are typically chilled or frozen promptly after baking (Specification at page 11, lines 32-35). Freezing inhibits the moisture equilibration, which reduces the crispness of the edges of the baked products (Specification at page 12, lines 1-2). In short, conventional baked cookies that are frozen become soggier around the edges when thawed as compared to the warmed, baked cookies having a dual texture as presently recited. The dual texture of the cookie can also be enhanced by thawing the frozen dough products on a support surface which contacts at least a portion of the base of each frozen dough product.

A second way to obtain the baked cookies, preferably in combination with the first way previously discussed, is to warm the cookies in a merchandiser that operates with convection heating (*See* Specification at page 13, lines 33-34 to page 14, lines 1-3 and page 14, lines 22-26).

Yet another alternative or additional way the cookies can be obtained is through the particular temperature conditions maintained and the temperature control within a merchandiser or other warming apparatus (*See* Specification at page 17, lines 22-33). The heat source of a merchandiser can be designed to heat the enclosure to a temperature from about 95°F to 150°F, preferably from about 110°F to 130°F (*Id.*). In varying embodiments, the equipment is designed to achieve a desired enclosure temperature of about 110°F to 115°F, about 115°F to 120°F, about 120°F to 125°F, and about 125°F to 130°F (*Id.*).

The initial moisture content of the cookie also helps obtain the dual texture cookie (*See* Specification at page 11, lines 11-19 and lines 20-29). Preferably the cookie

contains an average of about 6 to 10 weight percent moisture, preferably 5 to 8 weight percent moisture, after the initial baking and during storage thereof (Specification at page 11, lines 15-18). This moisture content may be achieved by chilling or freezing the cookie promptly after baking (Specification at page 11, lines 30-31). The freezing of previously baked products also facilitates retaining moisture and a moisture profile within the products (Specification at page 11, lines 31-32).

The dual texture of the claimed cookies is also developed based on the desired moisture loss profile over time in different portions of the cookie as a result of the controlled warming and drying conditions (*See* Specification at page 15, lines 28-33 to page 16, lines 1-2). The desired moisture profile usually refers to a moisture loss of about 15 percent to 70 percent, preferably about 30 percent to 60 percent, of the moisture from the outer zone of the baked product over at least about 6 hours (*See id.*). For the central zone, the moisture loss is less than about 20 percent, preferably less than about 15 percent, and more preferably less than about 10 percent, over at least about 6 hours (*See id.*).

As can readily be seen, the Specification provides more than ample guidance to one of ordinary skill in the art to obtain the claimed cookie with a dual texture, even after several hours in a warmed enclosure. Moreover, the claimed invention provides warmed, baked cookies having this dual texture even after several hours of warming. Thus, Applicants respectfully request that this rejection under 35 U.S.C. § 112, first paragraph, is improper and should be reconsidered and withdrawn.

Claims 1-9 were rejected under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 4,892,745 to Gage et al. ("Gage") for the reasons set forth on pages 3-4 of the Office Action. Gage is stated to disclose cookies having a dual texture, with the cookies having a crisp texture region and a chewy texture region.

Gage is directed to a process of *accelerating* the texture *equilibration* in dual-textured crumb-continuous cookies by manipulation of sugar crystallization, increasing the rate of sugar crystallization, surface rehydration, variations in sugar particle size, alterations in the ratio of sugar to flour, and/or manipulation of the amounts of crystallization-resistant and readily crystallizable sugars (Col. 2, lines 19-40). In particular, Gage teaches a cookie made of two different dough portions, a first portion for an inner texture and a second portion for an outer texture with the second portion being wrapped around the first portion (Col. 5, lines 20-23). The inner and outer doughs have different crystallizable sugar content, the outer portion containing a higher amount of sugar (Col. 5, lines 25-36).

In contrast, the present invention does not require two portions of different dough formulations to achieve texture variation in the baked products (Specification at page

9, lines 13-14. Instead, the dual texture of crispness and chewiness of the claimed cookie is achieved by controlled warming and drying of the baked products, such as in a merchandiser to maintain the dual texture over a time period of several hours, *e.g.*, for at least about 6 hours. New independent claim 15 recites that the cookie comprises a single previously baked dough material to more clearly and distinctly recite that the claimed cookie does not have multiple dough portions as taught by Gage.

Further, claim 1 has been amended to recite that the baked cookie moisture gradient is at least about 7.5 percent water content in the central portion and below about 4 percent water content in the outer portion after about 6 hours of warming. Gage does not teach or suggest to retain the dual texture moisture content of the claimed cookie after about 6 hours. On the contrary, Gage teaches a tempering period for texture *equilibration* where the moisture of the cookie edge starts very low (about 2 to 3%) and within 4 to 5 days approaches a much higher level (about 5%) (Col. 6, lines 11-14). This moisture then very slowly drops back toward an equilibrium value of about 4 to 4.5% (Col. 6, lines 14-16). This tempering is needed to reach an equilibrium of sucrose crystallization. This process is, however, very time consuming, and could not practically be applied to serve cookies at a foodservice location where cookies need to be warmed and served within hours. Most importantly, Gage also suggests that it is directed to providing *equilibration* of moisture, which is exactly the effect of leaving a baked cookie or dough in the open--moisture equilibrates between the central and outer zones of the dough product. Moreover, this tempering process has a tendency to include larger amounts of moisture in the outer portion, which is also the opposite of the claimed dual texture having a drier, crispier outer portion compared to the central portion.

The outer portion of the cookie of Gage has a moisture content of 4 to 4.5%, while claim 1 now recites a moisture value of below 4% in the outer portion of the cookie. Therefore, the crystallization of sugar in the outer region of Gage is not sufficient to achieve the claimed, desired moisture content, despite the difference in sugar content compared to the inner portion, and cannot compensate for the moisture transfer from the inner portion to the outer portion.

In the present invention, however, the cookie does not require a composite sugar dough, and the moisture profile in the claimed cookie is obtained by controlled drying of the outer surface under controlled convection heat while keeping the inner portion moist and soft. Due to the limited amount of time the claimed cookies are exposed to warming in a merchandiser or other warming device as described in the present application, the claimed cookie does not experience tempering and moisture *equilibration* as in Gage. Rather, the claimed cookie maintains the desired moisture gradient to provide the surprising and

unexpected advantage of both a soft chewy texture inside and a crispy outside in a previously baked cookie.

Furthermore, Gage teaches that its' cookie can be exposed to an exogenous source of moisture to rehydrate the cookie surface after baking (Col. 6, lines 50-52).

Steaming the cookie surface immediately after baking is one suitable way of rehydration (Col. 6, lines 52-55). This steam treatment reduces the chewiness of the cookie and increases the crispiness of the cookie that correlates with the increase of sugar crystallization.

Hydration of the cookie by steam would, however, also likely deteriorate the texture of the outer portion and would likely render the surface of the cookie more chewy than crispy, which is contrary to what is desired. This step is not required for preparing the claimed dual texture cookie. On the contrary, rehydrating the claimed baked cookies as described in Gage would completely destroy the desirable dual texture that is maintained in the claimed cookies. The claimed cookie has an initial moisture content after baking that is affected by one or more of the dough formulation, the baking procedure, the chilling or freezing of the dough, and the thawing and warming process. The claimed cookies are obtained only by warming in controlled dry air conditions, such as in a merchandiser or other suitable warming enclosure, in which the dual texture can be surprisingly and unexpectedly maintained for several hours.

The present invention demonstrates that, to provide a previously baked cookie to a consumer that has a dual texture, the specific dough formulation and process steps of Gage are not required and highly undesirable for application in a foodservice environment. Consequently, Gage fails to teach or suggest to one of ordinary skill in the art a dual textured cookie with the claimed moisture gradient obtained from a merchandiser or other warming enclosure. One of ordinary skill in the art familiar with the teachings of Gage would readily understand that a moisture gradient in a cookie can be obtained if the cookie is formulated with an outer portion having a high crystallizable sugar content, if the cookie experiences a tempering stage necessary to reach the sugar crystallization process, and/or if the cookie is exposed to a source of exogenous moisture to rehydrate the cookie surface after baking. Such an ordinary-skilled artisan would also clearly understand that Gage's moisture gradient is at best opposite that of the claimed dual texture--or at worst Gage teaches to provide cookies having no moisture gradient due to equilibration after several days. Gage fails to disclose or suggest the claimed dual texture, much less a cookie containing the dual texture having the claimed moisture gradient. This is true even after several hours of warming the claimed baked cookies, such as in a merchandiser or other warming enclosure.

New claim 13 recites that the outer portion of the cookie has a stress of at least 150 g/mm² after 6 hours of warming and the central zone has a stress of less than 45 g/mm²

after 6 hours of warming in an enclosure. The dual texture of the cookie is defined by the firmness of the outer portion and the central zone of the cookie as expressed by an amount of stress using a texture analyzer. Gage does not teach or suggest these claimed stresses after 6 hours of warming. As discussed above, Gage discloses no moisture gradient or the opposite moisture gradient from that presently claimed. Indeed, Gage does not even disclose a warming apparatus to maintain the desired moisture gradient over time. Moreover, Gage does not disclose or suggest the claimed stresses in the recited time frame (*See* FIGS. 1, 3, 5, 7, and 9). The first measurement taken was 2 days after the cookie is prepared.

New claim 15, in addition to reciting that the cookie comprises a single dough portion, also recites that the cookie has a dual texture and an average moisture level of about 6.5 to 10 weight percent water moisture after baking and that the cookie maintains its dual texture and average moisture level for at least about 2 to 8 hours after baking and during warming in an enclosure. Again, as previously discussed, Gage does not teach how to obtain the desired moisture gradient in the claimed cookies.

Because Gage does not teach each and every element of the claims, a *prima facie* case of obviousness has not been made. Accordingly, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

Accordingly, the entire application is now in condition for allowance, early notice of which would be appreciated. Should the Examiner not agree with the Applicants' position, then a personal or telephonic interview is respectfully requested to discuss any remaining issues and expedite the eventual allowance of the application.

Respectfully submitted,

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Date


Jeffrey A. Wolfson (Reg. No. 42,234)

WINSTON & STRAWN LLP
Customer No. 28765

(202) 371-5770